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In The

Supreme Court of the United States

October Term, 1951

No. 253

STERLING L. HICKS,
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ Of Certiorari

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In The

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No. 255

STERLING L. HICKS,
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition For Writ Of Certiorari.

STATEMENT OF THE CASE

The Petitioner, Sterling L. Hicks, seeks, by writ of *certiorari*, to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Mecklenburg County, North Carolina, imposing sentence upon the Petitioner based upon a conviction of the crime of conspiracy to maliciously commit damage and injury to real property and of the crime of conspiracy to wantonly, willfully and maliciously injure personal property, these being conspiracies to commit offenses prohibited by the North Carolina statutes. The opinion of the Supreme Court of North Carolina was filed May 2, 1951, and is reported as STATE v. STERLING L. HICKS, 233 N. C. 511, 64 S.E. (2d) 871. (See Appendix, p. 19, where opinion of Supreme Court of North Carolina is set out in full.)

FACTS

At the March Term, 1950, of the Superior Court of Mecklenburg County, Sterling L. Hicks and Chesley Morgan Lovell were tried upon two consolidated bills of indictment. The first indictment, No. 15,772, charged that Hicks and Lovell, and other persons unknown, conspired to willfully and maliciously injure a building owned by the Jefferson Standard Broadcasting Company in violation of § 14-50 of the General Statutes. (See Appendix, p. 14.) The other indictment, No. 15,773, contained two counts. In the first count, it was alleged that Hicks and Lovell conspired to violate § 14-127 of the General Statutes (See Appendix, p. 14) by maliciously committing damage and injury on the real property of the Jefferson Standard Broadcasting Company. The second count in this indictment alleged that Hicks and Lovell conspired to commit the crime prohibited by § 14-160 of the General Statutes (See Appendix, p. 14) by wantonly and maliciously injuring the personal property of the Jefferson Standard Broadcasting Company.

This trial, held in the Superior Court of Mecklenburg County at the March Term, 1950, resulted as follows: Lovell pleaded guilty to the consolidated indictments and was sentenced to prison. A jury trial was held as to the Petitioner, Sterling L. Hicks, and the jury found the Petitioner Hicks not guilty upon indictment No. 15,772. The judge sustained a motion for judgment as of nonsuit at the close of the evidence as to the second count in indictment No. 15,773. This is equivalent to a verdict of not guilty. The jury found the Petitioner Hicks guilty on the first count in indictment No. 15,773, the same being the count charging a conspiracy to damage the real property of the Jefferson Standard Broadcasting Company which is a conspiracy to violate § 14-127 of the General Statutes.

The Petitioner appealed this conviction to the Supreme Court of North Carolina, and the Supreme Court of North Carolina held that there was a fatal variance between the allegations of the count upon which Hicks was convicted

and the proof. Briefly, the Court said that the conspiracy charged was to maliciously commit damage and injury upon the real property of the Jefferson Standard Broadcasting Company, whereas the proof was to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company. The opinion of the Supreme Court of North Carolina in this case is reported as STATE v. STERLING L. HICKS and CHESLEY MORGAN LOVELL, 233 N. C. 31, 62 S.E. (2d) 497. (See Appendix, p. 15, where the opinion of the Supreme Court of North Carolina in this case is set out in full.) The case as to these indictments, therefore, was reversed, the Supreme Court of North Carolina, among other things, saying: "The motion for a judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised."

At the January, 1951, Regular Term of the Superior Court of Mecklenburg County, the Petitioner Hicks was again indicted on a bill of indictment containing two counts. The first count charged that the Petitioner Hicks and Lovell and others conspired to commit damage and injury to the real property of the Duke Power Company. The second count contained the same allegations as to conspiracy except it was charged that in this instance, the Petitioner and Lovell conspired to willfully and maliciously injure personal property of the Duke Power Company. (R. 2)

Before the Petitioner Hicks was tried the second time, that is, at the January, 1951, Term of the Superior Court of Mecklenburg County, and before pleading to the bill of indictment, the Petitioner entered a plea of former acquittal or former jeopardy which appears on R. 5, 6, 7, 8, and 9. Briefly, it will be seen that the Petitioner sets out his indictments in the previous trial and relates what happened to these indictments. He also sets out the indictment on which he was to be tried in the second trial but contends that these were identical offenses and that the same identical evidence would have to be used to convict him. He said, therefore, that his acquittal at the former trial of

indictment No. 15,772 operated as an acquittal as to the charges contained in the bill of indictment returned against him at the January, 1951, Criminal Term of Mecklenburg County. (R. 8) The Petitioner tendered issues to be submitted to the jury, which the judge refused to submit, and the Petitioner's plea of former acquittal or former jeopardy was overruled, the Court holding as a matter of law that such defenses or pleas could not be sustained. (R. 9)

ARGUMENT

I.

THE DENIAL OF PETITIONER'S PLEA OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L. ed. 314

The Petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

U. S. v. RAGEN, (1950; C.C.A. 7), 181 F. (2d) 1001
AMRINE v. TINES, (1942: C.C.A. 10), 131 F. (2d) 827
Compare: PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288
MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597

In U. S. v. RAGEN, *supra,* it is said, at p. 1003:

> "The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '*** nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;***.' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States. Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Phillips v. McCauley, 9 Cir., 92 F.2d 790.
>
> * * * * * * *
>
> "The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U.S. 319, 323, 58 S.Ct. 149, 151, 82 L.Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'
>
> "The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra,* it is said, at p. 833:

> "And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court, the Petitioner's plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the Petitioner was not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a State Court with respect to a question arising under the Constitution of the State. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304, 62 L. ed. 304
DAVIS v. OHIO, 241 U. S. 565, 60 L. ed. 1172
GRAHAM v. WEST VIRGINIA, 224 U. S. 616, 56 L. ed. 917

In North Carolina, it is held that where the accused himself secures a reversal or procures the indictment to be quashed, he cannot, when subsequently indicted, assert anything under the former indictment and cannot avail himself of any defense based on the former trial.

STATE v. DRAKEFORD, 162 N. C. 667, 78 S.E. 308

In STATE v. DRAKEFORD, *supra,* the Court said:

"The court properly overruled the plea of former jeopardy. The names might well have been held *idem sonans,* or, at the most, an immaterial variance, and the former trial should have proceeded. S. v. LANE, 80 N. C., 407; S. v. COLLINS, 115 N. C., 716, and numerous instances there collected; 29 Cyc., 272-277; 21 A. and E. (2d Ed.), 313-316.

"But the prisoner having been discharged on the former trial at his own instance, cannot now avail himself of this defense. In 12 Cyc., 266, it is said: 'Where the accused has secured a decision that an indictment is void, or has procured its being quashed, or has been

granted an instruction based on its defective character, directing the jury to acquit, he is estopped, when subsequently indicted, to assert that the former indictment was valid,' citing U. S. v. JONES, 31 Fed., 725; JOY v. STATE, 14 Ind., 139; S. v. MEEKINS, 41 La. Ann., 543.

"On the same page, 12 Cyc., 266, it is further said: 'If the accused is acquitted by the direction of the court on the ground of material variance, he cannot plead the acquittal as a bar, for he has never been in jeopardy, and when tried on a new indictment, the crime then alleged is not the same as in former indictment. And it has been held that if the accused on the prior trial maintained that the variance was material, and the court directed a verdict of acquittal on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material,' citing very many cases which sustain this proposition; among them, S. v. BIRMINGHAM, 44 N. C., 120; S. v. REVELS, *ib.*, 200; S. v. SHERRILL, 82 N. C., 694."

See also STATE v. CRISP, 188 N. C. 799, 125 S.E. 543.

It is believed that the rulings of this Court in this respect are in accord with those of the State Court.

U. S. v. BALL, 163 U. S. 62, 41 L. ed. 300
STROUD v. U. S., 251 U. S. 15, 64 L. ed. 103

It is the established authority in the jurisdiction of North Carolina that no jeopardy attaches where there is a fatal variance in the bill of indictment.

STATE v. MILLER, 231 N. C. 419, 57 S.E. (2d) 392
STATE v. DRAKEFORD, 162 N. C. 667, 78 S.E. 308
STATE v. SHERRILL, 82 N. C. 694
Compare: STATE v. BEAL, 202 N. C. 266, 162 S.E. 561
STATE v. CORRELL, 229 N. C. 640, 50 S.E. (2d) 717

It will be seen that the Supreme Court of North Carolina (STATE v. STERLING L. HICKS, 233 N. C. 511, 516, 64

S.E. (2d) 871), in construing its own substantive law, decided (1) the Petitioner did not aver any facts outside the record showing the identity of the crimes charged in the former indictments with those described in the warrant upon which the Petitioner was tried, and (2) it would not avail the Petitioner because if he had offered evidence outside of the record in order to support his plea, the evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company would not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company.

II.

THERE IS NO CONSTITUTIONAL OR FEDERAL QUESTION INVOLVED AS TO THE CONDUCT OF THE PROSECUTOR, THE TYPE OF QUESTIONS PROPOUNDED TO THE WITNESSES OR AS TO THE COMPETENCY OF THE EVIDENCE ON THE TRIAL.

The Petitioner complains because of what he alleges to be the improper and reprehensible conduct of the prosecuting attorney on the trial and what the Petitioner contends is his bad faith in making statements and asking questions.

An examination of the record will show that no exception was made and presented to the State Supreme Court on the conduct of the prosecutor as a separate exception or assignment of error. The prosecuting officer did cross-examine the Petitioner as to various matters that occurred at other radio stations (R. 40, 41, 42, 43, 44, 45) and as to statements the Petitioner had made, as well as a letter sent to the Federal Communications Commission on August 6, 1949 (R. 43), signed by the Petitioner as Business Manager of the Local Union. The State Court considered all of these exceptions and decided that the questions propounded by the prosecuting officer were proper and competent under State law, saying: "The Solicitor did not transgress legal proprieties in undertaking to impeach the

defendant as a witness by cross-examining him as to antecedent acts of misconduct. S. v. KING, 224 N. C. 329, 30 S.E. (2d) 230."

Objections to the competency or relevancy of evidence in a State Court involve the application either of the general or local law of evidence and, as such, furnish no ground for review or interposition by this Court.

BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492
ADAMSON v. CALIFORNIA, 332 U. S. 46, 67 S. Ct. Rep. 1672, 1679
LIZENBA v. CALIFORNIA, 314 U. S. 219, 227, 86 L. ed. 166
BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890
SHERMAN v. GRINNELL, 144 U. S. 198, 36 L. ed. 403
BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454

Under State law, it was competent for the State of North Carolina, in the prosecution of the Petition, to inquire into other incidents at other radio stations to determine the scope of the conspiracy, and it was competent to show independent collateral events or crimes of the same nature for the purpose of showing intent, design or plan, and conspiracy itself is one of the cases which, under the North Carolina authorities, falls within the exception to the general rule.

STATE v. SUMMERLIN, 232 N. C. 333, 337, 60 S.E. (2d) 322
STATE v. STANCILL, 178 N. C. 683, 100 S.E. 241
STATE v. DAIL, 191 N. C. 231, 131 S.E. 573
STATE v. BATTS, 210 N. C. 659, 188 S.E. 99
PEOPLE v. STEVENS, 248 P. 696, 700 (Cal.)
HELZER v. PEOPLE, 68 P. (2d) 543, 552 (Col.)
STATE v. CONTINENTAL PURCHASING CO., 195 A. 827, 831 (N. J.)
ALLSBROOK v. COMMONWEALTH, 50 S.W. (2d) 22, 24 (Ky.)

BANNING v. U. S., 130 Fed. (2d) 330, 337
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WALKER v. U. S., 93 Fed. (2d) 393, 394
DEVOE v. U. S., 103 Fed. (2d) 584, 589

The answer to all of these objections is that they were questions of local State law and were passed upon by the Supreme Court of North Carolina, and no Federal question can be predicated upon its ruling. An inspection of the record will show that no Federal question was raised nor was any exception or assignment of error predicated upon a violation of the Fourteenth Amendment. Any alleged violation of the Federal Constitution was not even briefed or debated in the Supreme Court of North Carolina, and the Supreme Court of North Carolina has not passed upon any such question from a viewpoint of the Federal Constitution. No alleged violation of the Fourteenth Amendment is set forth in the record, assignments of error or the brief filed by the Petitioner. It is said by the Petitioner that he was "framed" by the perjury of the State's witnesses. There is no evidence of any such conduct. The State's witness, Lovell, who testified against the Petitioner, had already entered a plea of guilty to his part in the conspiracy and as to his part in the overt acts committed and had already received sentence to the State's Prison. (R. 11, 12) No exception was presented to the Supreme Court of North Carolina on the question of perjured evidence or on the conduct of the prosecuting attorney aside from the competency of evidence and the questions propounded. Even if the evidence were perjured, which on this record is specifically denied by the State, there is no evidence that the prosecuting officer knew of such fact or had any part in the matter. The Supreme Court of North Carolina did not pass upon any constitutional question involving the Fourteenth Amendment in regard to these contentions which are now asserted for the first time.

III.

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONER FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the Petition for writ of *certiorari* are not Federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the Petition, for the Petitioner failed to set up any of these questions *as questions arising under the Constitution of the United States* in the State Courts.

Careful examination of the record will show that, although the Petitioner took exceptions to alleged errors of law, he failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (Appendix, p. 19) treats the exceptions taken by the Petitioner as raising questions of State law only. No Federal questions are mentioned. The Petition for writ of *certiorari* filed in this Court omits any allegation that Federal questions were set up as such in the State Courts.

The Petitioner admits on R. 8 and 9 of his brief that at the time the plea of double jeopardy was filed, no specific constitutional violation of the Fourteenth Amendment was asserted aside from the fact that the plea was made at all, and the Petitioner impliedly admits that no allegation was made or asserted that he had been deprived of constitional rights under the Fourteenth Amendment. The Petitioner's only contention is that the question was impliedly raised and that such question arises from the record itself. The Supreme Court of North Carolina certainly did not know that it was passing upon a question involving the Four-

teenth Amendment and did not pass upon any such question at all.

Under the statute authorizing review by *certiorari* of decisions of the highest Courts of the several States, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U.S.C. 1940 ed., Sec. 344

The rights, privileges, or immunities must be set up in the State Courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722

CONCLUSION

The Petitioner quotes § 17 of the Constitution of the State of North Carolina as follows:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The Petitioner then cites STATE v. MANSFIELD, 207 N. C. 233, 176 S.E. 761, as holding that this constitutional prohibition applies to a person being tried twice for the same offense.

The only statement in STATE v. MANSFIELD, *supra*, which bears on the subject is as follows: "It is a fundamental principle that a person cannot be tried twice for the same offense, and a plea of former acquittal or conviction is a good plea. S. v. CLEMMONS, *post;* Const. of N. C., Art. 1, § 17; Const. of U. S., Amendment V."

It is, therefore, by no means certain that this point was expressly decided as the MANSFIELD case went off on other grounds. We have already referred to the record in

this case as showing that no Federal question was presented on the Fourteenth Amendment, and we are now referring to the brief filed by the Petitioner in the Supreme Court of North Carolina at the Spring Term, 1951, in the case of STATE v. STERLING L. HICKS, No. 505, and we refer to this brief and make it a part of our Appendix, and we are having copies of this brief certified to the Supreme Court of the United States by the Clerk of the Supreme Court of North Carolina. An examination of this brief will show that no constitutional question was presented from a Federal viewpoint. It will further show that no constitutional question was presented from a Federal viewpoint as to the conduct of the prosecuting officer, perjured testimony or as to the Petitioner being "framed."

The cases cited by the Petitioner on the question of double jeopardy, such as SEALFON v. U. S., 332 U. S. 575, 92 L. ed. 180, for the most part deal with the subject of double jeopardy in cases arising in the Federal Court. For example, in the SEALFON case, the question went off on the proposition of *res adjudicata.* The plea of double jeopardy was abandoned. Of course, there is no question about the application of the Fifth Amendment to cases arising in the Federal Courts.

The questions set out in the Petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State Courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

HARRY McMULLAN,
Attorney General

RALPH MOODY,
Assistant Attorney General,

Counsel for the State of North Carolina, Respondent.

APPENDIX

§ 14-50, General Statutes of North Carolina:

Conspiracy declared a felony; punishment.—If any two or more persons shall conspire to willfully and maliciously injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitroglycerine, dynamite, gunpowder, or other high explosive, each and every one so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for not less than two years and not more than fifteen years.

§ 14-127, General Statutes of North Carolina:

Malicious injury to real property.—If any person shall maliciously commit any damage, injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days.

§ 14-160, General Statutes of North Carolina:

Malicious injury to personal property.—If any person shall wantonly and willfully injure the personal property

of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

STATE v. STERLING L. HICKS and CHESLEY MORGAN LOVELL.

(Filed 13 December, 1950)

APPEAL by defendant STERLING L. HICKS from BENNETT, SPECIAL JUDGE, March Extra Criminal Term, 1950, of MECKLENBURG.

Criminal action tried upon two bills of indictment, one of which charged Sterling L. Hicks and Chesley Morgan Lovell with conspiring to damage a building owned by the Jefferson Standard Broadcasting Company, by the use of dynamite or other high explosive; and the other charged them with conspiring "to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company," and "to wantonly and willfully injure the personal property of the Jefferson Standard Broadcasting Company, to-wit: Radio Broadcasting equipment."

The defendant Chesley Morgan Lovell pleaded guilty to the charges as contained in both bills of indictment.

In apt time the Solicitor made a motion to consolidate the cases for the purpose of trial, and it was so ordered.

The State offered the defendant Lovell as a witness, who testified that he was introduced to the defendant Hicks on Main Street, in Columbia, S. C., about 5:30 p.m., on 12 January, 1950, and that Hicks said he had a job for him; that when he inquired as to the nature of the job, Hicks said, "We will talk some other place." They then went to a cafe in West Columbia. "We . . . talked for two or three minutes and he started telling me about the plans, showed me how to get into W-B-T tower. He first wanted me to 'throw' the tower. By throwing the tower I mean to cut the guy-lines from No. 3 tower. But he said there was a house in range of it, and it might fall on the house, and I

said I didn't want no part of it. Then he said we could blow up the transformer . . . . Hicks asked me what I would charge to do the job, and I told him it would be worth $250.00 and he would have to give me some transportation—that I didn't have any car or money. He said 'How much transportation money would it take'? and I said 'Around $25.00,' and he gave me $25.00 and left, and I didn't see him any more. . . . Hicks agreed to pay me when the job was finished. He said he was affiliated with the Brotherhood—some union. Hicks said if we could get the transformer knocked out, we could put pickets around it, and keep electricians from going in there to repair it."

The State offered evidence by other witnesses tending to show that the defendant Hicks was in Columbia on the above date, making inquiry about the defendant Lovell, and that Lovell was located, and Hicks and Lovell went to the cafe in West Columbia, where the defendant Lovell testified the agreement was made. The defendant Lovell further testified that he received a telephone call on 19 January, 1950, from a man he thought to be Hicks. "He told me where the dynamite was hid, and I picked it up."

According to Lovell, he visited the premises of the Jefferson Standard Broadcasting Company on Friday night, the 20th, but didn't "like the looks of the place, with the tower all lit up, so I hid the dynamite in the woods and went back to Columbia." On the following night, "I went and got the dynamite—and I went towards the tower with it; and the 'law' hollered at me and I threw it down and ran. . . I got access to the tower by cutting the barbwire fence."

On cross-examination Lovell testified, "I do not say that upon a payment of $25.00 I made these two or three trips to Charlotte for the purpose of trying to blow up the W-B-T tower. I was not to blow up the tower—it was the transformer, not the tower. The transformers are not within the fence that encloses the tower. They are to one side . . . I was going to stick the dynamite under the transformer and light the fuse and leave." The witness admitted he had a criminal record and was on probation at the time

he was arrested in connection with the present charges.

Evidence was offered by the State to the effect that the entire property of the Broadcasting Company, consisting of 19 acres, was enclosed by four strands of barbed wire, and that there was an individual fence approximately five feet high and fifty feet square around each of three towers located on the property; and that the gate to each of these enclosures is kept locked, as required by the Federal Communications Commission.

M. J. Minor, Chief Engineer of the Broadcasting Company, testified: "There is a transformer, or power mat, west of the transmitter building, approximately 150 feet from the building. This is not Jefferson Standard property; the property belongs to the Duke Power Company, and its purpose is to serve the Jefferson Standard Broadcasting Company."

At the close of the State's evidence, the appellant interposed a demurrer to the evidence and moved for judgment as of nonsuit. The demurrer was overruled and the motion denied.

Hicks then testified in his own behalf and denied that he was in Columbia, S. C., on 12 January, 1950, or at any other time since May, 1948. He denied having talked with Lovell, and testified he had never seen him prior to the preliminary hearing on 23 February, 1950. Approximately a dozen witnesses testified they talked with the defendant Hicks in Charlotte on 12 January, 1950. And according to the testimony of seven or eight of these witnesses, they talked with him between 5:30 and 9:00 p.m., on the above date. Certain documentary evidence was also introduced, which tended to corroborate the testimony of the defendant Hicks and his witnesses in this respect. He also offered evidence of his good character.

The motion for judgment as of nonsuit was renewed at the close of all the evidence, and was sustained as to the count charging a conspiracy to injure personal property.

The jury returned a verdict of not guilty as to the charge of conspiracy to damage a building owned by the Jefferson

Standard Broadcasting Company, but "Guilty of conspiracy to damage real property."

From the judgment entered on the verdict, the defendant Hicks appeals and assigns error.

ATTORNEY-GENERAL McMULLAN AND ASSISTANT ATTORNEY-GENERAL MOODY FOR THE STATE.

RALPH V. KIDD AND J. C. SEDBERRY FOR DEFENDANT STERLING L. HICKS.

DENNY, J. The appellant assigns as error the failure of the trial judge to sustain his demurrer to the evidence and allow his motion for judgment as of nonsuit interposed at the close of the State's evidence, and renewed at the close of all the evidence. This assignment of error is bottomed on the contention that there is a fatal variance between the charge in the bill of indictment upon which the appellant stands convicted and in the proof submitted to the jury.

The only evidence offered by the State, tending to establish a conspiracy to maliciously damage property, was the testimony of the defendant Lovell, who entered a plea of guilty and was used as a witness for the State. Lovell testified that he was employed by Hicks for a consideration of $250.00 to blow up the transformer. There is no evidence of an agreement to damage the real property of the Jefferson Standard Broadcasting Company. The transformer, or power mat, which serves the Broadcasting Company, according to the State's evidence, is not the property of the Jefferson Standard Broadcasting Company, but, on the contrary, is the property of the Duke Power Company.

In the case of S. v. MASON, 35 N. C. 341, RUFFIN, C. J., in speaking for the Court, said: "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." S. v. HILL, 79 N. C. 656; S. v. SHERRILL, 81 N. C. 550.

In the last cited case the defendant and others were indicted for trespass upon the premises of one Harris, where-

as the evidence revealed that the trespass was upon the premises of one Lewis. This was held to be a fatal variance.

There is a fatal variance between the indictment and the proof on this record. The indictment charges the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company. The proof is to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company. S. v. NUNLEY, 224 N. C. 96, 29 S.E. 2d 17; S. v. CORPENING, 191 N. C. 751, 133 S.E. 14; S. v. HARBERT, 185 N. C. 760, 118 S.E. 6; S. v. GIBSON, 169 N. C. 318, 85 S.E. 7; S. v. DAVIS, 150 N. C. 851, 64 S.E. 498.

The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence. S. v. LAW, 227 N. C. 103, 40 S.E. 2d 699; S. v. GRACE, 196 N. C. 280, 145 S.E. 399; S. v. HARRIS, 195 N. C. 306, 141 S.E. 883; S. v. HARBERT, *supra;* S. v. GIBSON, *supra.*

The motion for judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised. S. v. LAW, *supra;* S. v. JACKSON, 218 N. C. 373, 11 S.E. 2d 149; S. v. GIBSON, *supra.*

Reversed.

STATE v. STERLING L. HICKS.

(Filed 2 May, 1951.)

APPEAL by defendant from CLEMENT, J., and a jury, at the January Term, 1951, of MECKLENBURG.

Criminal prosecution for conspiracy tried upon a two-count indictment.

The first count alleges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to violate G. S. 14-127 by maliciously committing damage and injury upon the real property of the Duke Power Company, and the second count charges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to commit the

misdemeanor denounced by G. S. 14-160 by wantonly and willfully injuring the personal property of the Duke Power Company, to wit: "electrical transformers and other equipment of said Duke Power Company . . . located upon and near the property of the Jefferson Standard Broadcasting Company."

The events set forth in the next two paragraphs antedated the trial on the present indictment.

The defendant and Chesley Morgan Lovell made personal appearances at the March Term, 1950, of the Superior Court of Mecklenburg County to answer two consolidated indictments numbered respectively 15,772 and 15,773. Indictment 15,772 charged that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" committed the felony denounced by G. S. 14-50 by conspiring "to wilfully and maliciously injure . . . a building owned by the Jefferson Standard Broadcasting Company, which said building was then and there in actual use by said Jefferson Standard Broadcasting Company for business purposes, by the use of dynamite and other high explosives." Indictment 15,773 contained two counts. The first count alleged that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" conspired to violate G. S. 14-127 by maliciously committing damage and injury upon the real property of the Jefferson Standard Broadcasting Company, and the second count averred that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" conspired to commit the misdemeanor defined by G. S. 14-160 by wantonly and wilfully injuring the personal property of the Jefferson Standard Broadcasting Company.

Lovell pleaded guilty to the consolidated indictments, and was sentenced to imprisonment. A jury trial was had as to the defendant, who denied guilt. Virtually the same testimony was adduced by both the prosecution and defense at the March Term, 1950, as was presented by them at the trial now under review. The presiding Judge acquitted the defendant upon the second count in indictment 15,773 under G. S. 15-173 by sustaining his motion for a

compulsory nonsuit thereon at the close of all the evidence; the jury found the defendant not guilty upon indictment 15,772; and the jury convicted the defendant upon the first count in indictment 15,773, i.e., the count charging a conspiracy to damage the real property of the Jefferson Standard Broadcasting Company. The defendant appealed to this Court from the judgment pronounced against him on the verdict upon the last mentioned count, and won a reversal here solely on the ground that there was a fatal variance between the allegations of that count and the proof. This Court said: "There is a fatal variance between the indictment and the proof on this record. The indictment charges the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company. The proof is to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company . . . The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence . . . The motion for judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised." SEE: S. v. HICKS, *ante*, 31, 62 S.E. 2d 497. After the decision of this Court in the former action was certified to the Superior Court, the present indictment was returned by the grand jury.

Before pleading to the present indictment, the defendant filed a plea of former acquittal, setting forth indictments 15,772 and 15,773 and the present indictment and the result of the former trial, and concluding from these matters that the crimes described in the present indictment are identical with those charged against him in indictments 15,772 and 15,773 and that by reason thereof his acquittal upon those indictments constitutes a bar to the present prosecution. The defendant tendered these two issues; (1) Has the defendant been formerly acquitted of the charge contained in the first count of the present bill of indictment? (2) Has the defendant been formerly acquitted of the charge contained in the second count of the present

bill of indictment? He prayed the court to submit the issues to the jury before the submission of the general issue of guilt, and to allow him to offer evidence before the jury on the trial of the issues to establish the identity of the two counts in the present indictment with the offenses charged in the previous indictments. Judge Clement "refused to submit to the jury the two issues tendered by the defendant . . . , and . . . held, as a matter of law, that there was no former acquittal or former jeopardy involved in this case." The defendant reserved exceptions to the rejection of his plea of former acquittal, and pleaded not guilty to the indictment.

The action was then tried on the merits before a petit jury.

The case made out by the State's testimony is summarized in the next two paragraphs.

The Jefferson Standard Broadcasting Company operates Radio Station WBT, which has offices in the City of Charlotte and a transmission station in a rural section of Mecklenburg County. The transmission station is located on a 19 acre tract owned by the Broadcasting Company, and is operated by means of electric power transmitted to it by the Duke Power Company through a transformer substation situated on the same land at a distance of 730 feet from the transmission station. The transformer substation is maintained and operated by the Duke Power Company, which placed it upon the 19 acre tract under a written contract binding the Jefferson Standard Broadcasting Company and specifying that the four transformers are the property of the Duke Power Company.

The defendant, a resident of Charlotte and a discharged employee of the Jefferson Standard Broadcasting Company, made several statements prior to 12 January, 1950, indicating that he entertained ill will for the Broadcasting Company and desired to put Radio Station WBT out of business. On the late afternoon of that day, he and Chesley Morgan Lovell made an agreement at Jimmy's Cafe near Columbia, South Carolina, whereby Lovell agreed to "blow up the transformers" at the transformer substation on the

19 acre tract and whereby defendant agreed to pay Lovell $250.00 for so doing. Seven days later the defendant caused a supply of dynamite to be concealed behind a signboard near Jimmy's Cafe, and notified Lovell of that fact by telephone. Lovell took the dynamite into his possession and carried it from South Carolina to Mecklenburg County, North Carolina, where he entered upon the 19 acre tract under cover of darkness on the night of 21 January, 1950, for the purpose of dynamiting the transformers pursuant to his agreement with the defendant. He was apprehended by peace officers with the dynamite as he approached the transformers, and for that reason was unable to accomplish his object.

The defendant offered evidence tending to show that he was not acquainted with Lovell and did not conspire with him or any other person to do any injury to the property of the Jefferson Standard Broadcasting Company, the Duke Power Company, or any other person.

The jury found the defendant "guilty on both counts set forth in the bill of indictment." The judge decreed that he should be imprisoned as a misdemeant for two years on each count, but stipulated that the two sentences should run concurrently.

The defendant excepted and appealed, assigning as error the rejection of his plea of former acquittal, the refusal of his motions for compulsory nonsuits, various rulings in respect to evidential matters, and numerous portions of the charge.

ATTORNEY-GENERAL McMULLAN AND ASSISTANT ATTORNEY-GENERAL MOODY FOR THE STATE.

RALPH V. KIDD AND J. C. SEDBERRY FOR THE DEFENDANT, APPELLANT.

ERVIN, J. It is an ancient and basic principle of criminal jurisprudence that no one shall be twice put in jeopardy for the same offense. S. v. MANSFIELD, 207 N. C. 233, 176 S.E. 761. Several criteria have been prescribed by the authorities for determining in diverse situations

whether two indictments are for the same offense. The one applicable on the present record is the "same-evidence test," which is somewhat alternative in character. It is simply this: Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment (S. v. FREEMAN, 162 N. C. 594, 77 S.E. 780, 45 L.R.A. (N.S.) 977; S. v. HOOKER, 145 N. C. 581, 59 S.E. 866; S. v. HANKINS, 136 N. C. 621, 48 S.E. 593; S. v. NASH, 86 N. C. 650, 41 Am. Rep. 472; S. v. REVELS, 44 N. C. 200; S. v. BIRMINGHAM, 44 N. C. 120; S. v. JESSE, 20 N. C. 95), or whether the same evidence would support a conviction in each case. S. v. CLEMMONS, 207 N. C. 276, 176 S.E. 760; S. v. BELL, 205 N. C. 225, 171 S.E. 50. See, also, in this connection: 22 C.J.S., Criminal Law, section 279.

Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is always to be determined by the court from an inspection of the two indictments. S. v. NASH, *supra*. Whether the same evidence would support a conviction in each is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. S. v. BELL, *supra*.

When these rules are laid alongside the case at bar, it is clear that the judge rightly refused to submit to the jury the two specific issues tendered by the defendant and rightly rejected the plea of former acquittal. The plea merely set forth the several indictments and the result of the former trial, and drew the legal conclusion from these bare matters that the defendant was being twice put in jeopardy for the same offense. It did not aver any facts *dehors* the record showing the identity of the crimes charged in the former indictments with those described in the present one. These things being true, the plea was insufficient, for it revealed on its face the nonidentity of the several offenses. The defendant's legal standing would not be bettered a whit, however, on this phase of the case

if his plea of former acquittal had gone beyond the record and invoked the extrinsic testimony. This is so because evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company will not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company. S. v. HICKS, *supra;* S. v. CRISP, 188 N. C. 799, 125 S.E. 543.

This brings us to the question whether the trial judge erred in refusing to dismiss the prosecution on compulsory nonsuits under G. S. 15-173.

The defendant was not entitled to have the action nonsuited on the theory that the crime alleged was committed outside the State. While the conspiracy was formed in South Carolina, one of the conspirators, namely, Chesley Morgan Lovell, committed overt acts in Mecklenburg County, North Carolina, in furtherance of the common design. As a consequence, the Superior Court of Mecklenburg County had jurisdiction to try the action. S. v. DAVIS, 203 N. C. 13, 164 S.E. 737; 22 C.J.S., Criminal Law, section 136. In legal contemplation, a criminal conspiracy is continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. 11 Am. Jur., Conspiracy, section 23.

The defendant advances this additional argument in support of his contention that the trial court erred in refusing to nonsuit the action: The four transformers had been converted into realty by annexation to the land, and by reason thereof belonged to the Jefferson Standard Broadcasting Company. Hence, there was a fatal variance between the indictment charging a conspiracy to damage or injure the property of the Duke Power Company, and the proof showing a conspiracy to damage or injure the realty of the Jefferson Standard Broadcasting Company.

This position is untenable. The transformers were not physically annexed to the land. S. v. MARTIN, 141 N. C. 832, 53 S.E. 874. Moreover, they were placed on the land under a contract with the landowner specifying that they

should remain the property of the Duke Power Company. Consequently, the transformers retained the character of personality. R. E. v. DEAL, 90 N. C. 110; FEIMSTER v. JOHNSON, 64 N. C. 259. It necessarily follows that the testimony of the State was sufficient to carry the case to the jury and to support the verdict on the second count, i.e., the count charging a criminal conspiracy to injure the personal property of the Duke Power Company.

There was no evidence at the trial, however, to sustain the verdict on the first count, i.e., the count charging a criminal conspiracy to commit damage and injury upon the real property of the Duke Power Company. Nevertheless, the erroneous submission of the first count to the jury is unavailing to defendant unless he shows error affecting the second count. This is true because the jury convicted the defendant on both counts, and the court imposed upon him equal sentences running concurrently on both counts. S. v. MERRITT, 231 N. C. 59, 55 S.E. 2d 804; S. v. WARREN, 227 N. C. 380, 42 S.E. 2d 350.

A painstaking examination of the remaining exceptions discloses no prejudicial error affecting the second count.

The testimony of the State's chief witness, Chesley Morgan Lovell, that he was serving a sentence for complicity in the affair under investigation was competent to forestall a contention on the part of the defense that he was testifying for the prosecution to obtain personal immunity. The testimony of the State's witness, Frank Turbeyville, a soldier, that he appeared as a witness at the trial in obedience to orders of his military superior was admissible to counteract the imputation made by the defense on his cross-examination that he was there in the capacity of a hired witness.

The prosecution laid a proper foundation for the introduction of Lovell's evidence as to the telephone conversation in which he was informed of the concealment of the dynamite behind the signboard near Jimmy's Cafe. Lovell had heard the defendant talk, and expressed the opinion that the voice heard on the telephone was that of the defendant. Stansbury: North Carolina Evidence, section 129;

U. S. v. EASTERDAY, 57 F. 2d 165. Any lack of assurance on Lovell's part as to the identity of the speaker went to the weight of the evidence and not to its admissibility. Stansbury: North Carolina Evidence, section 96. Moreover, the telephone conversation contained internal evidence that the person at the other end of the line was a party to the criminal conspiracy formed a week before. S. v. STRICKLAND, 229 N. C. 201, 49 S.E. 2d 469. It was proper for the State to introduce in evidence the dynamite which Lovell found at the signboard immediately after the telephone conversation and had in his possession at the time of his apprehension. The testimony indicated that the dynamite was provided by the defendant to enable Lovell to consummate the conspiracy. 22 C.J.S., Criminal Law, section 712. It is not perceived how the defendant suffered any prejudice through the unsuccessful effort of the Solicitor to have the witness Lovell identify the dynamite caps. S. v. COFFEY, 210 N. C. 561, 187 S.E. 754. These articles were not received in evidence.

Since the testimony for the prosecution tended to establish that the ultimate object of the conspiracy was to silence Radio Station WBT, the court rightly received the evidence of the State's witnesses, Fletcher Austin, James B. Patterson, and Alonzo G. Squires, as to antecedent threats of the defendant to injure the Jefferson Standard Broadcasting Company, the owner of the radio station. The same observation applies to the expressions of hostility for the Broadcasting Company contained in the handbill distributed by the defendant and the letter written by him. The threats and expressions of ill will were admissible to show intent and motive. Stansbury: North Carolina Evidence, section 83.

The Solicitor did not transgress legal proprieties in undertaking to impeach the defendant as a witness by cross-examining him as to antecedent acts of misconduct. S. v. KING, 224 N. C. 329, 30 S.E. 2d 230.

The trial judge did not err in his instruction to the jury. When the charge is read contextually, it is manifest that the court instructed the jury accurately on the law of the

case, summed up the evidence of the witnesses correctly, and stated the contentions of the prosecution and defense fairly.

For the reasons given, there is in a legal sense
No error.